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No. 00-189

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
and COEUR D'ALENE TRIBE,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF BENEWAH COUNTY AND KOOTENAI COUNTY OF IDAHO IN SUPPORT OF STATE OF IDAHO, PETITIONER

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QUESTIONS PRESENTED

Prior to the admission of the State of Idaho on an equal footing with the original states by Act of July 3, 1890 [26 Stat. 215], did Congress act with the intent to defeat state title to submerged lands below navigable Lake Coeur d'Alene? Did Congress authorize the president or other executive officers to defeat state title to such submerged lands prior to Idaho statehood?[1]

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[1] The Questions Presented is a restatement pursuant to Rule 24.1(a) of the Question Presented stated by the State of Idaho in its Brief on the Merits.

LIST OF ALL PARTIES

A. Parties to the Proceeding Below.

The Writ of Certiorari is to the decision of the 9th Circuit Court of Appeals. The parties before the 9th Circuit were the State of Idaho, the United States of America and the Coeur d'Alene Tribe of Idaho and are the same parties that appear before this Court.

B. Amici Counties.

This Amicus Curiae Brief is submitted by Benewah County and Kootenai County in the State of Idaho pursuant to Rule 37.4. The navigable waters at issue are located in the Amici Counties.

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United States Department of the Interior, Federal Indian Law U.S. Government Printing Office (1958) 19

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DECISION BELOW

The writ of certiorari is to the United States Court of Appeals for the Ninth Circuit. The decision of the Ninth Circuit Court of Appeals is set forth in *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) and is further set forth in the Petition Appendix pgs. 1-30. The Ninth Circuit Court of Appeals affirmed the decision of the United States District Court, in *United States v. Idaho*, which is reported at 95 F. Supp.2d 1094 (Idaho 1998), which is also set forth at Petition Appendix pgs. 31-86. The Ninth Circuit Court of Appeals and the District Court held that the United States and the Coeur d'Alene Tribe have fee simple absolute title to the submerged lands of Coeur d'Alene Lake and the St. Joe River.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on May 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8.

"The Congress shall have the power . . . [Clause 3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . "

United States Constitution, Article IV, Section 3.

[Clause 1] "New States may be admitted by the Congress into this Union. . . . "

[Clause 2] "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State."

United States Constitution, Article IV, Section 4.

> "The United States shall guarantee to every State in this Union a Republican Form of Government. . . . "

United States Constitution, Amendment X.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Idaho Admission Act, 26 Stat. 215, Section 1.

"The State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed."

STATEMENT OF THE CASE

These Amici Counties concur generally with the Statement of the Case provided by the State of Idaho.

These Amici Counties provide additional support in the text of the argument hereafter based upon public reports and records as they appeared before Congress.

SUMMARY OF THE ARGUMENT

In 1890, Idaho was admitted into the Union on an equal footing with the original states. In 1994, the United States brought an action to quiet title to a portion of the beds and banks of the navigable waters of Coeur d'Alene Lake and the St. Joe River lying within the exterior boundaries of the Coeur d'Alene Indian Reservation established by an 1891 Act of Congress. The Coeur d'Alene Tribe was an intervenor in the District Court. *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (Petition App. pp. 1-30).

States have a special sovereign status under the scheme of government in the United States Constitution. Generally, the beds and banks of navigable waters become part of the sovereign rights acquired by a state through the operation of the Constitution of the United States when a state is admitted on an equal footing with the original states. *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-197 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-74 (1977). There is a strong presumption against defeating Idaho's title to submerged lands. *See Montana*, 450 U.S. at 552.

The Executive Order in 1873, the agreements between the Tribe and the United States negotiated in 1887 and

1889, the admission of the State of Idaho by Congress on an equal footing in 1890, and the 1891 ratification of the 1887 and 1889 agreements by Congress should be considered in the context of the Congressional and government policies at the time. Congress has the exclusive power to dispose of territory and property belonging to the United States. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 324-25 (1942). Prior to the admission of Idaho as a state of the Union on an equal footing with the original states in 1890, the policy of Congress and the executive department was to diminish tribal relations and tribal control and to facilitate individual Indians to become self-sufficient and depend on agriculture for their subsistence. The general policy was for the "assimilation" and "civilization" of individual members of the Tribe.

The State of Idaho was admitted on an equal footing with the original states. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215. The rule of law established by this Court when Idaho was admitted was that: (1) submerged lands under navigable waters were held in trust for future states while the lands were part of a territory; and (2) new states were to be admitted on an equal footing and were to have the same rights as the original states in submerged lands below navigable waters. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1844); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). The enactments of Congress and the decisions of this Court which are contemporaneous with the negotiation of agreements with the Coeur d'Alene Tribe support the conclusion that Congress did not intend to recognize tribal ownership of the beds of the navigable waters of Lake Coeur d'Alene and the St. Joe River prior to Idaho statehood in 1890. The conclusion of the Ninth

Circuit Court of Appeals upholding tribal ownership of navigable waters is inconsistent with the actions of Congress and the decisions of this Court between 1842-1891.

The public's right of access and use of navigable waters is part of the "Public Trust Doctrine". Since the earliest days of the existency of the United States of America, Congress has jealously guarded navigable waters to assure the public's right to access and use of such waters. The concept of the Public Trust Doctrine was first explained in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842). The Public Trust Doctrine was further described in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435, 452 (1892) and establishes the rights of the public in navigable waters.

The Coeur d'Alene Tribe has claimed that it has the power to exclude or prohibit any use of Lake Coeur d'Alene by non-Tribal of the navigable waters owned by the Tribe. Amicus Curiae Brief in Support of Petitioner, Appendix at pp. 2 and 5. It is clear that the State of Idaho could not exclude or prohibit the use of such navigable waters by the public. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1093-94 (Idaho 1983). There is no body of law which assures the use of navigable waters by the non-tribal members of the public, including non-members of the Tribe, if such waters are owned by the United States for the Coeur d'Alene Tribe. State ownership is necessary to preserve the public's right to access and to use Lake Coeur d'Alene.

ARGUMENT

A. Amici Counties.

This Amicus Curiae Brief is submitted pursuant to Rule 37.4. These amici are Benewah County and Kootenai County in the State of Idaho. The navigable waters at issue are located within the Amici Counties. The navigable waters are claimed by the United States and the Coeur d'Alene Tribe. The residents of the Amici Counties have used and enjoyed these navigable waters for more than 100 years.

The Amici Counties and the public located in Amici Counties are being affected by the decision of the Ninth Circuit Court of Appeals, and will be affected by the decision of this Court. The decision of the Ninth Circuit Court of Appeals in *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) not only ousts the State of Idaho from exercising jurisdiction and authority over the navigable waters within the Coeur d'Alene Indian Reservation, but ousts the Amici Counties from exercising any jurisdiction or authority over activities on such navigable waters. In addition, the Tribe claims that it has the absolute and exclusive authority over the navigable waters, including the power and authority to exclude or prohibit any use of such waters by non-members. The purpose of this Amicus Curiae Brief is to emphasize the far reaching implications of the decision of the Ninth Circuit Court of Appeals and to provide further support for ownership of submerged lands underlying navigable Lake Coeur d'Alene by the State of Idaho.

B. States Have Special Status Under the Constitution.

United States Constitution, Article I, Section 2, provides that each *State* shall have a representative in the House of Representatives. United States Constitution, Article I, Section 3, provides that each *State* shall have two Senators. United States Constitution, Article I, Section 8, Clause 3 provides that Congress shall have the power to "regulate commerce . . . among the several *States*, and with the Indian tribes. . . . " United States Constitution, Article III, Section 2, paragraph 1 provides that the judicial power of the United States extends to controversies between two or more *States*. United States Constitution Article IV, Section 1 provides that full faith and credit is to be given in each *State* to the records and acts of every other State. Article IV, Section 3 provides that new States may be admitted by the Congress into the Union and further protects the integrity of each State. United States Constitution, Article IV, Section 4 provides that the United States shall guarantee to every State a "republican form of government. . . . " United States Constitution, Amendment X provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the *States, are reserved to the States* respectively, or to the people". . . . United States Constitution, Amendment XI provides that the judicial power of the United States does not extend to suits brought against a *State* by citizens of another State. Amendment XI required the dismissal of the suit of the Coeur d'Alene Tribe of Idaho against the State of Idaho where the Tribe claimed title to the submerged navigable waters of Lake Coeur d'Alene, a portion of which are the same navigable

waters that are at issue in this case. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

At an early date, Chief Justice Marshall described the distinctions between a State and an Indian tribe. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Justice Marshall concluded that tribes are "not a State of the Union. . . . " *Id.* at 16. Indian tribes "may, more correctly, perhaps, be denominated domestic dependant nations." *Id.* at 17. This Court concluded that the framers of the United States Constitution "had not the Indian Tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states." *Id.* at 18. Chief Justice Marshall reached the following conclusion:

> The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of the opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and cannot maintain an action in the courts of the United States.

Id. at 20. Justice Marshall did note the plenary power of Congress found in the United States Constitution, Article I, Section 8, Clause 3, which authorizes Congress to regulate commerce with Indian tribes. *Id.* at 18.[2] Nowhere in

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[2] *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that the U.S. Supreme Court may review a decision of a state court to determine if state law is superceded by the U.S. Constitution, laws enacted under the Constitution, or treaties of the United States.). *Worcester* dealt with the application of Georgia's penal code on lands held by the Cherokee Nation pursuant to a treaty with the U.S.

the Constitution, nor in any case law laid down by this Court, is there support for a conclusion that an Indian tribe should be treated the same as States when determining title to submerged lands. Furthermore, as discussed *infra* at H., the public trust doctrine applicable to States with regard to navigable waters has never been applied to Indian tribes.

The status of States, (new States and original States), and the Union of States is discussed in *Coyle v. Smith*, 221 U.S. 559 (1911). Although it may be argued that much of the dissertation in *Coyle* is dicta, the discussion is, nonetheless, instructive. In concluding that the State of Oklahoma was empowered with the same attributes of sovereignty as the original states in connection with the moving of Oklahoma's capital, the Court also discussed this Court's prior decisions dealing with the status of States, particularly decisions relating to title to navigable waters in the original states and new states and the sovereign rights of the states under the Constitution and the equal footing doctrine first laid down by this Court in *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845). *Coyle*, 221 U.S. at 70. The title of States in connection with navigable waters has, on only two occasions, been deemed to have been defeated. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), *and United States v. Alaska*, 521 U.S. 1 (1997) (discussed *infra* at D).

C. State Sovereignty Over Submerged Lands under the United States Constitution.

The Constitution of the United States ratified in 1789 provides in Article I, Section 8, Clause 3 that "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes." This Court concluded that the power of Congress under the foregoing provision includes the power of Congress to regulate navigation within the limits of every State. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). In *Gibbons v. Ogden*, this Court recognized that the authority of Congress over navigation may not be exclusive. *Id.* at 197-98.

In *Gibbons v. Ogden*, this Court discussed the respective authorities of states and Congress over commerce and navigation. *Id.* at 197-221. In its discussion, the Court took note of the argument that states retain sovereignty over commerce and navigation based upon the 10th Amendment reserving all of the powers to the states that had not been granted to the Federal Government. *Id.* at 198. The Court further took notice of the provisions in the United States Constitution providing that the Constitution and all laws enacted pursuant to the United States Constitution are the supreme law of the land.[3] However, the discussion of Chief Justice Marshall of this Court in *Gibbons v. Ogden* can be distilled to one overriding principle. That principle is that when Congress has exercised the authority expressly granted to it by the Constitution

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[3] *Id.* at 210-211 (apparently referring to United States Constitution, Article VI, Clause 2).

for the regulation of commerce, including navigation (*i.e.*, the licensing of ships), a state is prohibited from enacting or enforcing a statute which is inconsistent with or in conflict with Congress' statute. *Id.* at 211-218. This Court left open the authority of a state over navigable waters where Congress had not exercised its authority under the United States Constitution.

Generally a state has authority over navigable waters in the state absent an act of Congress on the subject matter. *Wilson v. The Blackbird Creek Marsh Company*, 27 U.S. 245, 252 (1829). Absent a regulation enacted by Congress, a state has authority to authorize the construction of bridges over navigable waters. *Id.* The authority of states over navigable waters was recognized by this Court on many occasions throughout the 19th Century.[4]

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[4] *See Huse v. Glover*, 119 U.S. 543, 549-550 (1886) (Illinois may authorize a dam on a navigable river and the owner may charge a reasonable nondiscriminatory fee to use the locks thereof); *Cardwell v. American River Bridge Company*, 113 U.S. 205, 208-209 (1884) (a bridge authorized by a state which restricts navigation on navigable water is not prohibited by the United States Constitution or other laws unless Congress has acted to prohibit such obstruction); *Miller v. Mayor of New York*, 109 U.S. 385, 397 (1883) (Brooklyn Bridge was duly authorized by both the State of New York and Congress); *Escanaba and Lake Michigan Transportation Company v. City of Chicago*, 107 U.S. 678, 683-84 (1882) (Illinois has full power to regulate bridges over navigable waters until Congress acts on the subject; *Pound v. Turck*, 95 U.S. 459, 462-64 (1878) (Wisconsin may authorize dams on navigable waters until prohibited by Congress); *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 727-732 (1866) (a bridge authorized by the State of Pennsylvania is lawful since Congress had not exercised its authority to restrict such bridge); *Pennsylvania v. The Wheeling and Belmont Bridge Company*, 54 U.S.

The only exception to state authority over navigable waters is where the authority was surrendered to the general Government under the Constitution of the United States. *Martin*, 41 U.S. at 410. The Original States became sovereign and took title to the beds of navigable waters in trust for the public. *Id.* New states took title to the beds of navigable waters on an equal footing with the original states. *Pollard*, 44 U.S. at 229-230. In 1876, this Court acknowledged that the inland states, by reason of their "inherent sovereignty," have title to the beds and shores of navigable rivers and lakes. *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876). The sovereignty of states over submerged lands and navigable waters has always been preeminent except to the extent that such sovereignty has been surrendered to the general Government pursuant to the United States Constitution and where Congress has acted.

D. Standard for Defeating State Title to Submerged Lands.

This Court has recognized that "the ownership of land under navigable waters is an incident of sovereignty." *Montana*, 450 U.S. at 551. Control over property underlying navigable waters is strongly identified with the sovereign power of government. *Id.* at 552; *see also United States v. Oregon*, 295 U.S. 1, 14 (1935). At issue in

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(13 How.) 518, 565-578 (1851) (a bridge authorized by Virginia over a navigable river which blocked navigation of goods to and from Pennsylvania was prohibited by an act of Congress, which approved a compact between Virginia and Kentucky assuring free navigation on the navigable river); *Wilson*, 27 U.S. at 252.

this case is whether the State of Idaho or the United States and the Coeur d'Alene Tribe have the rights and powers over the navigable water at issue herein. This Court has previously recognized Idaho's ownership of the beds of navigable waters in Idaho under the equal footing doctrine. *Scott v. Lattig*, 227 U.S. 229, 243 (1913). In fact, this court has previously acknowledged that Idaho claims that it owns Lake Coeur d'Alene. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997).

This court has always recognized several governing principles which apply to state claims to the ownership of submerged lands under navigable waters. The ownership of submerged lands is an essential attribute of sovereignty for states. *Id.* at 282-83; *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Utah Division of State Lands*, 482 U.S. at 195-198; *Montana*, 450 U.S. at 551-552; *Oregon*, 295 U.S. at 14; *United States v. Holt State Bank*, 270 U.S. 49, 53-54 (1926); *Shively*, 15 U.S. at 43-44; *Pollard*, 44 U.S. at 228-29; *Martin*, 41 U.S. at 410.

A party challenging a state's title to submerged lands has a heavy burden to bear.

> [A] court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States . . . and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain" . . . or was rendered "in clear and special words" . . . or "unless the claim confirmed in terms embraces the land under the waters of the stream". . . . (Citations omitted.)

Montana, 450 U.S. at 552. This court further stated that "Congress was, of course, aware of this presumption once it was established by this Court." *Id.* at note 2.

The principle that the original states acquired title to the beds of navigable waters within the boundaries of the state was established in 1842 in *Martin v. Lessee of Waddell, supra*. The principle that new states are admitted on an equal footing with the original states and that the United States holds title to the beds of navigable waters within territories in trust for future states was established in *Pollard v. Hagen, supra*. Clearly, it must be presumed that Congress knew that the beds of navigable waters in the Territory of Idaho were held by the United States in trust for the future state prior to the admission of Idaho in 1890. Congress knew that there would be a strong presumption against any conveyance to anyone, including the Coeur d'Alene Tribe. Congress also knew that if Congress intended for such conveyance to be effective, Congress would be required to authorize such conveyance in clear and special words with the intention of Congress being definitely declared or otherwise made plain.

As previously noted, this Court has only held that a state's title to the beds of inland navigable waters was defeated in two cases. *See Alaska*, 521 U.S. at 45-46, *and Choctaw Nation*, 397 U.S. at 631. Each case had its peculiar circumstances. *Choctaw Nation* dealt with treaties between the United States and the Choctaw Nation. The treaties provided for the conveyance of fee simple title in the land in the reservation to the Tribe, and a pledge by the United States that " '[n]o Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation- . . . and that no part of the land granted to them shall ever

be embraced in any Territory or State.' " *Choctaw Nation*, 397 U.S. at 625. Under the circumstances of *Choctaw Nation*, it cannot be argued that the United States held title to the beds of the navigable waters in the territory in trust for a future state, since the United States had made a solemn promise that there would be no future state. Thus, the equal footing doctrine would not apply to the lands within the territory granted to the Choctaw Nation. In addition, the commitments made by the United States to the Choctaw Nation were made prior to statehood and were made by treaties under the status of the law as it existed at that time – 1830s.

United States v. Alaska is the other case where this Court determined that state title to inland navigable waters was defeated. In *Alaska*, Congress had expressed its intent to defeat Alaska's title to submerged lands underlying a petroleum reserve and a wildlife refuge in Alaska's admission act. *Alaska*, 521 U.S. at 41-42. In the analysis, this Court determined: that Congress had authorized the President to reserve lands for a specific purpose; that the lands that were reserved by the President included the submerged lands; and that Congress intended to defeat state title when Alaska was admitted. *Id.* at 41-46.

As shown by the two exceptions (*Choctaw* and *Alaska*), this Court has placed a very high hurdle for anyone to succeed in a claim to defeat the title of a state to submerged lands. As explained in *Montana v. United States*, submerged lands are strongly identified with the sovereign power of a state, are presumed to have been conveyed to the states on admission, are deemed to have been conveyed only if the intention is definitely declared

or otherwise made plain in clear and special words. *Montana*, 450 U.S. at 552. As will be shown hereafter, the events surrounding issuance of the Executive Order creating the Coeur d'Alene Indian Reservation in 1873 and the ratification of the agreements negotiated with the Coeur d'Alene Tribe by Congress in 1891 show that Congress did not express its intent to convey or reserve the submerged lands of Coeur d'Alene Lake for the Coeur d'Alene Tribe at any time prior to, or after, statehood.

E. The Established Government Policy and Law when Idaho was Admitted in 1890 Does Not Support United States and Tribal Ownership of Lake Coeur d'Alene.

In 1871, the Congress prohibited any new treaties with Indian Tribes. Act of March 3, 1871, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1983)). No treaty was ever entered into between the United States and the Coeur d'Alene Tribe prior to 1871. After 1871, Congress had the exclusive authority to dispose of public lands or lands within territories. *See* U.S. Const. art. IV, § 3, cl. 2; *Sioux Tribe of Indians*, 316 U.S. at 326. Thus, to defeat Idaho's title, there must have been some action by Congress where the intent of Congress to defeat state title was clearly expressed in special words. By the 1870s, the general policy of Congress was to reduce the role of tribal governments and increase the independence and assimilation of individual tribal members. From 1855 to 1919, hundreds of reservations for Indian occupancy and other purposes were created by executive order. *Sioux Tribe of Indians*, 316 U.S. at 325. Congress had acquiesced in the establishment of Indian reservations by executive order.

Id. However, Congress never viewed an Indian reservation established by executive order as conferring title to land to an Indian Tribe without express authority provided by Congress. *Id.* at 325-330. After the withdrawal of authority for the President to contract with Indian Tribes by treaty by Congress in 1871, Indian reservations could only be established by the enactment of a statute by Congress, or with an executive order authorizing use and occupancy of land without title to the land. *Id.* at 324-330.

The general policy of the Government from 1871 until after the admission of the State of Idaho in 1890 and the ratification of the agreements with the Coeur d'Alene Tribe in 1891 was to "assimilate" or to "civilize" the members of all of the Indian Tribes and to dissolve the relationship between individual members of a tribe and the tribal organization. The policy of the Government toward tribes and their members is illustrated in numerous reports to Congress. After Congress prohibited any new treaties with tribes, the Secretary of the Interior reported that the Government claimed the right to control the soil which the Indians occupied and assumed the right to coerce the tribes to adopt the habits and customs of the non-Indian people of the United States, including the establishment of tribal members on farms. Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 43d Cong., 3d Sess. 3-4, 7 (1872). In 1873, at the same time the President set aside lands for the Coeur d'Alene Tribe, the President submitted the report of the Secretary of the Interior to Congress discussing the policy concerning the division of Indian reservation lands and the pursuit of a policy of teaching tribal members to engage in farming

activities.[5] The policy of encouraging agricultural pursuits by individual tribal members continued in 1874.[6] Throughout the remainder of the 1870s, and at least until the Government policy continued to provide lands to individual tribal members and teach the members how to farm and provide for themselves in fixed homes on individual parcels of land.[7]

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[5] 5 H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 43d Cong., 1st Sess. (1873) at pp. III-IV.

[6] 6 H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 34th Cong., 2d Sess. (1874) at pp. III-IV.

[7] *See* H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 44th Cong., 1st Sess. (1875) at pgs. IV and IX; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 44th Cong., 2d Sess. (1876) at pg. VII; House Executive Document No. 1, Part 5 Report of the Secretary of the Interior, 45th Cong., 3d Sess. (1878) pgs. III-V; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 46th Cong., 2d Sess. (1879) at pgs. 5-7; *see also* H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 46th Cong., 3d Sess. (1880) at page 4; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 47th Cong., 1st Sess. (1881) at page III; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 47th Cong., 2d Sess. (1882) at pgs. VII-VIII; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 49th Cong., 1st Sess. (1885) at pgs. 26-27; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 49th Cong., 2d Sess. (1886) at page 4; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 50th Cong., 1st Sess. (1887) at pgs. 24-28; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 52d Cong., 1st Sess. (1891); H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 50th Cong., 2d Sess. (1888) p. XXIX; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 51st Cong., 1st Sess. (1890) (containing the Secretary's Report for 1889); H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 51st Cong., 2d Sess. (1890), at pgs. XXIII-XXIV.

In 1887, Congress enacted the General Allotment Act. Act of February 8, 1887 (24 Stat. 388, *et seq.*) (codified at U.S.C. § 331, *et seq.* (1983)). The policy of the General Allotment Act was "to end the tribal and nomadic life of the Indians by allotting a portion of reservation lands in severalty to each Indian residing on a reservation, and selling off the excess lands The Indians were to be established as individual settlers on separate allotments of land gaining a livelihood by pastoral pursuits." *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir. 1969). In *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650, note 1 (1976), this Court noted the object of the General Allotment Act of 1887 was to end tribal land ownership and to provide for private ownership by individual Indians with the expectation of assimilation of individual Indians as members of society and to relieve the Federal Government of the need to supervise Indian affairs.[8]

On November 1, 1873, the Commissioner of Indian Affairs made a report to the Secretary of the Interior for

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[8] For a discussion of the General Allotment (Dawes) Act of 1887, *see Cohen's Handbook of Federal Indian Law*, 1982 Ed., pp. 130-132. For further discussions of Federal policies regarding the status of tribes and individual members in the late 1800s, *see United States Department of the Interior, Federal Indian Law*, U.S. Government Printing Office (1958), pp. 245-250 (hereafter referred to as "1958 Federal Indian Law"). It was reported that the " ' . . . settled policy of the Government [was] to break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life and deal with them not as nations or tribes or bands, but as individual citizens.' " 1958 Federal Indian Law at 249 (quoting Report, Commissioner of Indian Affairs, 1890, p. VI).

the year 1873, which was included with the Secretary's Report. With respect to the Coeur d'Alene Indians in Idaho, the Commissioner of Indian Affairs stated the following:

> AGREEMENT WITH COEUR D'ALENE INDIANS IN IDAHO
>
> In 1867, an executive order was issued setting apart a reservation for the Coeur d'Alenes, but, being dissatisfied with the location, they never located thereon, and continued to roam over the tract of country claimed by them. For the purpose of extinguishing their claim to all the tract of country claimed by them, and of locating them on a reservation *suitable to their wants as an agriculture people*, an agreement has been made by them by Hon. J.P.C. Shanks, J.O.V. Bennett, of Idaho, and Agent J.B. Monteith, subject to ratification by Congress, which is respectfully recommended. Pending such action by that body, *I have deemed it prudent to have set apart by executive order* the tract of country described in said agreement as a reservation for said Indians, in order that white persons may be prohibited from settling thereon and claiming compensation for improvements from the Government. . . . (emphasis added).[9]

Consistent with the statement made in the report of the Commissioner of Indian Affairs, President Grant

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[9] The Annual Report of the Commission of Indian Affairs to the Secretary of the Interior for the Year 1873 (Washington: Government Printing Office (1874)) p. 24 is set forth in H.R. Exec. Doc. No. 1, 43d Cong., 3d Sess. (1873).

signed the executive order dated November 8, 1873, which states the following:

> It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, *withdrawn from sale and set apart as a reservation* for the Coeur d'Alene Indians, in said territory, viz: [description of the reservation]. . . . (emphasis added).

Charles J. Kappler, Indian Affairs, Laws and Treaties, p. 837 (Government Printing Office, 1904). On February 8, 1873, the Attorney General of the United States issued an opinion concerning the authority of the President to establish Indian Reservations by executive order. 14 U.S. Op. Att'y Gen. 181 (1873). The Attorney General concluded the President had no general authority to establish Indian Reservations by executive order unless the President was authorized by a treaty or other act of Congress. *Id.* at 182. The Attorney General concluded that Section 14 of the Act of September 27, 1850, 9 Stat. 500 and Section 9 of the Act of February 14, 1853, 10 Stat. 159, restricted the authority of the President to establish reservations in the Territory of Washington and Territory of Oregon. In 1850, Coeur d'Alene Lake was located in the Territory of Oregon. In 1853, Coeur d'Alene Lake was part of the Territory of Oregon. By Act of Congress dated March 2, 1853, the Territory of Washington, which included the northern portion of what is now the State of Idaho, was separated from the Territory of Oregon and the Territory of Washington was established. 10 Stat. 172 *et seq.* It is now established, by acquiescence of Congress, that the President did have authority to withdraw public lands from the operation of the public land laws (*i.e.*, the

Homestead Laws of 1862 and the mining laws of 1872) but the President did not have authority to grant or recognize title in the public lands without express authority from Congress. *Sioux Tribe of Indians*, 316 U.S. at 324-25.

In 1887 and 1889, the United States negotiated agreements with the Coeur d'Alene Tribe. Pet. App. pp. 68, 74-76. The context of other Congressional enactments during the same time frame of the negotiation of the agreements in 1887 and 1889 together with the admission of the State of Idaho on an equal footing with the original states in 1890, and the 1891 Congressional ratification of the 1887 and 1889 agreements does not support ownership of Coeur d'Alene Lake by the United States or the Coeur d'Alene Tribe. The fact that Congress did not ratify the 1887 and 1889 Agreements until after the admission of Idaho on an equal footing implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters. The fact that the Idaho Admission Act of July 3, 1890, 26 Stat. 215, *et seq.* admitting Idaho on an equal footing with the original states makes no specific reference to the Coeur d'Alene Tribe or Lake Coeur d'Alene or the Coeur d'Alene Indian Reservation supports the conclusion that Congress did not intend to defeat Idaho title to Lake Coeur d'Alene as an exception to the equal footing doctrine.

F. There Was No International Duty or Public Exigency Sufficient to Defeat Idaho's Title to the Navigable Waters.

In many previous cases, this Court has concluded that a conveyance of land under navigable waters would

only be upheld because of some international duty or public exigency. *E.g., Montana,* 450 U.S. at 552; *Holt State Bank,* 270 U.S. at 55; *Shively,* 152 U.S. at 58. There is a strong presumption against a conveyance of the beds of navigable waters to defeat State title. *Montana,* 450 U.S. at 552. Conveyance of the submerged lands are not lightly to be inferred. *Id.*

Here, no "international duty" is shown by the findings of the District Court which would support a defeat of state title. The only "public exigency" found by the District Court relates to subsistence. Pet. App. pp. 60-61. The "public exigency" identified by the District Court has never been recognized by this Court as a basis for defeating the title of a State. Furthermore, there is no showing of a public purpose appropriate to the objects for which the United States holds title to the territory prior to Idaho statehood. Such public purpose and intent to defeat state title to submerged lands was established in *Alaska,* 521 U.S. at 40-46. Here, there has been no showing of such public purpose. The general policy of the federal government in the 1880s and 1890s (*supra* at E) shows that Congress did not intend to extend or promote tribal authority or ownership over the submerged lands at issue. Thus, the basic requirements for the defeat of State title do not appear in this case before this Court.

G. Regulation of Commerce with Indian Tribes does not Support Conveyance of Land to the Tribes.

This Court has long recognized that Congress has the power to regulate commerce with Indian Tribes under

United States Constitution, Article I, Section 8, Clause 3. *See Worcester*, 31 U.S. at 556-557, 561; *Cherokee Nation*, 30 U.S. at 18. Pursuant to Congress' authority, Congress frequently regulated commerce and contact with Indian tribes. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664-65 (1979); *Sioux Tribe of Indians*, 316 U.S. at 322. However, the regulation of commerce by Congress or the regulation of commerce by the Executive pursuant to an act of Congress does not imply or authorize the disposal of land, territory or property by Congress under United States Constitution, Article IV, Section 3, paragraph 2. *Sioux Tribe of Indians*, 316 U.S. at 325-330.

Alaska Pacific Fisheries v. United States may be cited as authority for the conveyance of submerged lands to an Indian Tribe. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 86-89 (1918). *Alaska Pacific Fisheries* involved an act of Congress. *Id.* at 86-87. *Alaska Pacific Fisheries* involved a reservation established by act of Congress. The reservation was in the Territory of Alaska, not a state admitted on an equal footing. (Alaska did not become a state until 1959. 72 Stat. 339 *et seq*; *see also* Proclamation No. 3269 Fed. Reg. 81 (1959)). There are many statutes regulating Indian Affairs that exist today. *See* Title 25 U.S.C. §§ 1-2108. However, with the exception of the facts as outlined in *Choctaw Nation v. Oklahoma*, and *United States v. Alaska*, Congress has not been deemed by this Court to have expressed Congress' intent to defeat state title to submerged lands in favor of an Indian tribe.

H. Rights of the Public Under the Public Trust Doctrine are Inconsistent with Tribal Ownership.

Since the earliest days of our federal government, the policy has been to preserve navigable waters for the use by the public. *See* 1 Stat. 468 (1796), *and* 2 Stat. 235 (1803). This policy and law remains today. *See* 43 U.S.C. § 931; *see also* Ordinance of 1787: The Northwest Territorial Government, Section 14, Article of Compact IV adopted by the Confederate Congress on July 13, 1787; *Gibbons, supra; Martin, supra; Pollard, supra.*

As shown by the Amicus Curiae Brief in Support of Petition, App. pp. 2 and 5, the Coeur d'Alene Tribe claims that it has the exclusive power and authority over the navigable waters within the Coeur d'Alene Indian Reservation. The Tribe further claims that it has the power to exclude or prohibit non-members from using the submerged lands under the navigable waters. This is inconsistent with the public trust doctrine applicable to states as previously announced by this Court. *See Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). A state holds the beds of navigable waters in trust for use by the public, which includes navigation of the waters and the liberty of fishing on such waters. *Id.* at 452.

The public trust doctrine was actually originally described in *Martin v. Lessee of Waddell*, 41 U.S. at 413-14. In *Martin*, this Court considered the question settled in England that the Magna Carta limited the authority of the King to make a grant of the soils under navigable waters to exclude the public from enjoying such waters, including the right of fishing, navigation, etc. *Id.* at 410. The

interest of the King of England devolved upon the original states by virtue of the Revolution. *Id.* at 416. New states have been admitted on an equal footing with the original states with the same limitations. *Illinois Central Railroad*, 146 U.S. at 435-437. The State of Idaho holds the lands lying under navigable water subject to the public trust doctrine with its limitations imposed on the State. *Kootenai Environmental Alliance*, 671 P.2d at 1093-94. The rights of the public to use the lands underlying navigable waters are well established in the United States and the State of Idaho.

The rights of the public, including the residents of these Amici Counties on navigable waters owned by the United States for the benefit of the Tribe or owned by the Tribe are not established under any law. Tribes are generally not constrained by the Constitutional provisions which govern the federal or state governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896). If the Coeur d'Alene Tribal Government legislates to exclude non-members on the navigable tribal waters, such Tribal Government is immune from suit unless the Tribe has unequivocally expressed a waiver of its sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59. Thus, any suit to protect use of the navigable waters by non-tribal persons would be met by the absence of a law protecting the public's rights like the Public Trust Doctrine and the sovereign immunity of the tribe.

The independence of a tribe from the will and law of non-members is illustrated in *In Re: Kang-Gi-Shun-Ca, otherwise known as Crow Dog*, 109 U.S. 556, 572 (1883) and *Santa Clara Pueblo*, 436 U.S. at 69-71. As shown in *Santa*

Clara Pueblo, a tribe establishes, for itself, its own membership rules. *Santa Clara Pueblo*, 436 U.S. at 52, note 2. A person who is not a member of the tribe may not vote in tribal elections or hold office in the Tribal Government, depending upon the tribal laws. *Id.* at 52. The non-member may be excluded from the reservation. *Id.* at 52-53. As previously noted, the Tribe claims that the Tribe may exclude a non-member from the use of the navigable waters within the Coeur d'Alene Indian Reservation by tribal law. Coeur d'Alene Tribal Code, 44-1.01 and 44.2.00 set forth in the Amicus Curiae Brief of Benewah County and Kootenai County of Idaho in Support of the State of Idaho, Petitioner at Appendix pp. 2 and 3.

United States Constitution Article IV, Section 4 guarantees to every State of the Union a republican form of government.

> "[T]he distinguishing factor of that [republican] form [of government] is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reported in representative bodies whose legitimate arts may be said to be those of the people themselves; but while the people are thus the source of political power their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against sudden impulses of mere majorities."

Duncan v. McCall, 139 U.S. 449, 461 (1891). The public, including members of the Coeur d'Alene Tribe are guaranteed the right to vote in all state and county elections. U.S. Const. amend. XV, § 1; *see also* 42 U.S.C. § 1971(d)(1).

There is no guarantee for the right to vote in tribal elections. Thus, any laws, ordinances, or regulations enacted or promulgated by the Coeur d'Alene Tribe for Lake Coeur d'Alene on the St. Joe River would be established by the Tribal Government of the Coeur d'Alene Tribe, and not by a republican form of government guaranteed by the United States Constitution.

It is difficult to conclude that Congress intended, when the Coeur d'Alene Reservation was established by Executive Order in 1873, when the State was admitted on an equal footing in 1890; and when the 1887 and 1889 agreements were not ratified until 1891, to defeat the sovereignty rights and title of Idaho over Lake Coeur d'Alene and the St. Joe River.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals. This Court should conclude, from the record, before Congress that the title to the lands underlying navigable waters of Lake Coeur d'Alene and the St. Joe River were held in trust by the United States for the future State of Idaho; and that the submerged lands were granted to the State of Idaho by operation of the Constitution under the Equal Footing doctrine. The

matter should be remanded for the entry of orders and judgment in favor of the State of Idaho.

Respectfully submitted,

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